Nike Global Trading BV, Singapore Branch v Pemungut Duti Setem, Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–36–06 OF 2022
AMARJEET SINGH J
5 AUGUST 2024

Revenue Law — Stamp duty — Assessment — Appeal against assessment under s 39 of Stamp Act 1949 — Assessment of stamp duty chargeable in relation to novation agreement — Whether novation agreement was chargeable under s 16(1) of Stamp Act 1949 read together with item 32(a) of First Schedule of Stamp Act 1949 — Contracts Act 1950 s 63 — Stamp Act 1949 ss 2, 4(1), 16(1), 38A, 39 & First Schedule item 32(a)

Via a novation agreement entered into between the plaintiff, the original lender of a loan and the borrower of the said loan, the original lender transferred the borrower's debt amounting to RM41,257,000 to the plaintiff. The collector of stamp duty ('the defendant') then assessed the duty due amounting to RM1,716,004. The assessment was made based on s 16 of the Stamp Act 1949 ('Act 378') read with item 32(a) of the First Schedule of the said Act. Dissatisfied with the assessment, the plaintiff filed an objection under s 38A of Act 378 but the same was dismissed by the defendant, hence the present appeal pursuant to s 39 of Act 378 ('the application'). The sole issue for determination in the present appeal was whether the novation agreement was chargeable under s 16(1) read together with item 32(a) of the First Schedule of Act 378.

Held, dismissing the application:

(1) Section 4(1) of Act 378 provided that subject to the Act and exemptions contained therein, the instruments specified in the First Schedule were chargeable with the stipulated duties. Thus, the governing principle was that stamp duty was chargeable on the instrument and not transactions. For stamp duty purposes, the substance as opposed to the form was important. The substance was what was revealed by the rights and obligations of the parties. The true meaning of the instrument or its nature and effect ought to be determined (see paras 8 & 11).

(2) A novation agreement was an agreement whereby the original party transferred all its rights and obligations on the original agreement to a new party. Section 63 of the Contracts Act 1950 provided that the effect of novation was that the original contract needed not be performed. A novation agreement was made with the consent of all the parties and brought into existence a new contract (see para 12).

(3) Under s 2 of Act 378, a 'debt' fell within the definition of 'property'. In the present case, upon the original lender fulfilling its obligation under the loan agreement by disbursing the loan, the purpose of the novation agreement was the transfer of the original lender's right to the plaintiff which was the right of repayment of the debt. Since the debt was transferred to the plaintiff, albeit, without monetary consideration, it was chargeable under item 32(a) of the First Schedule as if it was a transfer or conveyance on sale by virtue of s 16(1) of Act 378. Hence, the court agreed with the defendant that there was a transfer or conveyance of a property that arose from the novation agreement which attracted stamp duty under item 32(a) of the First Schedule (see paras 15 & 18).

[Bahasa Malaysia summary

Melalui suatu perjanjian novasi yang dimeterai antara plaintif, pemberi pinjaman asal pinjaman dan peminjam pinjaman tersebut, pemberi pinjaman asal memindahkan hutang peminjam berjumlah RM41,257,000 kepada plaintif. Pemungut duti setem ('defendan') kemudiannya mentaksir duti yang perlu dibayar berjumlah RM1,716,004. Taksiran tersebut dibuat berdasarkan s 16 Akta Setem 1949 ('Akta 378') yang dibaca bersama butiran 32(a) Jadual Pertama Akta tersebut. Tidak berpuas hati dengan taksiran tersebut, plaintif memfailkan bantahan di bawah s 38A Akta 378 tetapi bantahan tersebut telah ditolak oleh defendan, justeru rayuan semasa menurut s 39 Akta 378 ('permohonan tersebut'). Satu-satunya isu untuk penentuan dalam rayuan ini ialah sama ada perjanjian novasi tersebut adalah tertakluk kepada duti di bawah s 16(1) yang dibaca bersama butiran 32(a) Jadual Pertama Akta 378.

Diputuskan, menolak permohonan tersebut:

(1) Seksyen 4(1) Akta 378 memperuntukkan bahawa tertakluk kepada Akta dan pengecualian yang terkandung di dalamnya, instrumen yang disenarai dalam Jadual Pertama adalah tertakluk kepada duti yang dinyatakan dalam akta yang sama. Oleh itu, prinsip utama yang terpakai ialah duti setem dikenakan ke atas instrumen dan bukan urus niaga. Bagi tujuan duti setem, apa yang penting adalah inti pati dan bukannya bentuk. Inti pati adalah apa yang dizahirkan oleh hak dan kewajipan pihak-pihak. Maksud sebenar instrumen atau sifat dan kesannya hendaklah ditentukan (lihat perenggan 8 & 11).

(2) Perjanjian novasi ialah perjanjian di mana pihak yang asal memindahkan semua hak dan kewajipannya pada perjanjian asal kepada pihak yang baharu. Seksyen 63 Akta Kontrak 1950 memperuntukkan bahawa kesan novasi ialah kontrak asal tidak perlu dilaksanakan. Perjanjian novasi dibuat dengan persetujuan semua pihak dan mewujudkan kontrak baharu (lihat perenggan 12).

(3) Di bawah s 2 Akta 378, 'hutang' termasuk dalam takrifan 'harta'. Dalam

kes semasa, apabila pemberi pinjaman asal memenuhi kewajipannya di bawah perjanjian pinjaman dengan mengeluarkan pinjaman, tujuan perjanjian novasi adalah pemindahan hak pemberi pinjaman asal kepada plaintif yang merupakan hak pembayaran balik hutang. Oleh kerana hutang tersebut dipindahkan kepada plaintif, walaupun, tanpa balasan kewangan, ia adalah tertakluk kepada duti di bawah butiran 32(a) Jadual Pertama seolah-olah ia adalah pemindahan atau pemindahan hak atas jualan menurut s 16(1) Akta 378. Oleh itu, mahkamah bersetuju dengan defendan bahawa terdapat pemindahan atau pemindahan hak bagi suatu harta yang timbul daripada perjanjian novasi tersebut yang menarik duti setem di bawah butiran 32(a) Jadual Pertama (lihat perenggan 15 & 18).]

Cases referred to

BASF Services (M) Sdn Bhd v Pemungut Duti Setem [2010] 4 MLJ 596; [2010] 5 CLJ 109, FC (refd)

Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue [1976] 1 All ER 833, PC (refd)

Pemungut Duti Setem Malaysia v Perbadanan Pembangunan Pulau Pinang [2024] 6 MLJ 478; [2024] CLJU 982, CA (refd)

PPB Group Bhd v Pemungut Duti Setem [2011] 9 MLJ 145, HC (refd)

Tan Kay Thye & Ors v Commissioner of Stamp Duties [1991] 3 MLJ 150, HC (refd)

Teoh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39, FC (refd)

Legislation referred to

Contracts Act 1950 s 63

Stamp Act 1949 ss 2, 4(1), 16, 16(1), 38A, 39(1), First Schedule, items 27(a), 32(a)

Anlynn Ng (with Jason Liang Dinghui and Chloe Ng Yit Ping) (Wong & Partners) for the plaintiff.

Ridzuan bin Othman (with Amir Syafiq bin Abdul Karim) (Revenue Counsel, Inland Revenue Board Malaysia) for the defendant.

Amarjeet Singh J:

INTRODUCTION

[1] On 6 November 2023, I dismissed the originating summons filed by the plaintiff, Nike Global Trading BV, Singapore branch against the assessment of stamp duty (ad valorem duty) chargeable in respect of a novation agreement dated 17 December 2021 ('the novation agreement'). The plaintiff has appealed against the assessment under s 39(1) of the Stamp Act 1949.

[2] Hereinafter, all sections or schedules referred to in this judgment refer to the Stamp Act 1949.

BACKGROUND FACTS

[3] On 1 May 2021, Nike European Operations Netherlands ('the original lender') and Nike Sales (M) Sdn Bhd ('the borrower' entered into a loan agreement amounting to RM41,257,000. The loan agreement was assessed and stamped under item 27(a) of the First Schedule. The loan has been fully disbursed.

[4] Subsequently, the original lender and the borrower entered into a novation agreement with the plaintiff whereby the original lender transferred the debt amounting to RM41,257,000 to the plaintiff.

[5] The novation agreement was presented to the defendant, collector of stamp duties ('the collector'), for adjudication on 21 January 2022. The collector assessed the duty due amounting to RM1,716,004 via a notice of assessment dated 21 February 2022. The collector based the assessment on s 16 read with item 32(a) of the First Schedule. Dissatisfied, the plaintiff on 18 March 2022 filed an objection against the assessment under s 38A for a review of the assessment made. The objection was dismissed and the assessment was maintained by the collector. Hence this appeal.

THE ISSUES

[6] There is only one issue for determination in this appeal. It is as follows: whether the novation agreement is chargeable under s 16(1) read together with item 32(a) of the First Schedule?

[7] For convenience, both sections are reproduced below. Section 16(1) provides as follows:

> Any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale.

While item 32(a) of the First Schedule which provides for the description of the instrument ie conveyance, assignment, transfer, or absolute bill of sale, and the formula to calculate the proper stamp duty states as follows:

> On sale of any property (except stock, shares, marketable securities, and accounts receivables or book debts of the kind mentioned in paragraph (c)).

A ANALYSIS AND FINDINGS

[8] Section 4(1) of the Stamp Act 1949 provides that subject to the Act and exemptions contained therein the instruments specified in the First Schedule are chargeable with the stipulated duties. Thus, the governing principle is that
B stamp duty is chargeable on the instrument and not transactions.

[9] The law is instructively stated by the Federal Court in *BASF Services (M) Sdn Bhd v Pemungut Duti Setem* [2010] 4 MLJ 596; [2010] 5 CLJ 109 in the
C following paragraphs:

> [18] Now that this court has identified the transfer form as the instrument that is chargeable to stamp duty, the next step is to decide on whether the infrastructure fees are part of the consideration of the agreement and hence liable under item 32(a). It is generally acknowledged that the real substance of a transaction may not
D successfully be appreciated by mere perusal of a document, or by a hurried gauging of the machinery adapted by the parties of the transaction. Only after going through the exercise of construing the document as a whole may the real substance of that transaction be known and thenceforth ascertain the respective parties' rights and obligations, and the correctness of the respondent's adjudication *(Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1; *Pernas Securities Sdn Bhd v The*
E *Collector of Stamp Duties* [1976] 2 MLJ 188; [1976] CLJU 91; [1976] 1 LNS 91). CC Gallagher *Highmore's Stamp Laws* (4th Ed) at p 7 authored:
>
> > General Rules as to Stamp Duties
> >
> > In order to determine whether any, and if any what, stamp duty is chargeable
> F upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial ... For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereinafter written, yet if in truth the contract set forth was not a promissory note, but an
> G agreement of another character, the stamp duty would be not that of a promissory note but of the agreement. The question, therefore, is stamp or no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing.

[10] It is also useful to refer to the decision of the Court of Appeal in
H *Pemungut Duti Setem Malaysia v Perbadanan Pembangunan Pulau Pinang* [2024] 6 MLJ 478; [2024] CLJU 982 which provided, after a review of the principles in the abovementioned cases as well as other cases, a summary of the matters for the court to determine whether the stamp duty levied on an
I instrument is correctly imposed by the collector. The matters are as follows:

(a) the name, title, label, or description given to the instrument/document (label) by the parties in question is not conclusive. The court is not bound by the label and may go behind the label to determine the true nature of the instrument/document;

(b) the court has to construe the instrument/document as a whole;

(c) in addition to the instrument/document, the court may consider all relevant documents (relevant documents) so as to ascertain the true nature of the instrument/document;

(d) in deciding the true nature of the instrument/document, the court may consider all relevant circumstances regarding the instrument/document (relevant circumstances); and

(e) in considering the instrument/document, relevant documents, and relevant circumstances, the court determines the following matters:

(i) what is the true nature of the rights and obligations of the parties?

(ii) what is the effect of the instrument/document, relevant documents, and relevant circumstances? and

(iii) what is the substance of the instrument/document?

[11] The novation agreement transferred the debt from the original lender to the plaintiff without consideration. For stamp duty purposes the substance as opposed to the form is important. The substance is what is revealed by the rights and obligations of the parties. The true meaning of the instrument or its nature and effect is to be determined (see *Tan Kay Thye & Ors v Commissioner of Stamp Duties* [1991] 3 MLJ 150 and *Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue* [1976] 1 All ER 833). The question to be answered is whether the novation agreement falls within the meaning of s 16(1).

[12] A novation agreement is an agreement whereby the original party transfers all its rights and obligations on the original agreement to a new party. Section 63 of the Contracts Act 1950 provides that the effect of novation is that the original contract need not be performed. A novation agreement is made with the consent of all the parties and brings into existence a new contract. The Federal Court in *Teoh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39 said:

> Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract.

[13] While 'Assignment' is defined in *Black's Law Dictionary* as follows:

> A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.

[14] Upon scrutinizing the novation agreement, in particular, cl 1.2(b), it was agreed by the parties that the plaintiff assumed the rights, obligations,

duties, and liabilities of the original lender to perform in favour of the borrower all obligations of the original lender under the loan agreement and according to cl 1.2(c), the borrower agreed to perform in favour of the plaintiff all rights, obligations, duties, and liabilities as the original lender under the novated loan agreement. At this point in time the whole loan had been disbursed to the borrower and the purpose of the novation agreement was to transfer the debt to the plaintiff.

[15] Under s 2, a 'debt' falls within the definition of 'property'. The definition of 'property' is reproduced below and is as follows:

> 'property' includes movable or immovable property and any estate or interest in any property movable or immovable, whether in possession, reversion, remainder or contingency, and any debt, and anything in action, and any other right or interest in the nature of the property which is capable of being disposed of and has a value in it;

[16] Upon the original lender fulfilling its obligation under the loan agreement by disbursing the loan, the purpose of the novation agreement is the transfer of the original lender's right to the plaintiff which is the right of repayment of the debt. Since the debt was transferred to the plaintiff, albeit, without monetary consideration, is chargeable under item 32(a) of the First Schedule as if it was a transfer or conveyance on sale by virtue of s 16(1).

[17] In support thereof the collector submitted the case of *PPB Group Bhd v Pemungut Duti Setem* [2011] 9 MLJ 145 where it was stated as follows:

> [7] Looking at s 16, I agree with the contention of the respondent that payment in specie is a voluntary disposition *inter vivos* as contemplated under s 16(1) and (3) of the Act. In my view s 16(3) has been worded very widely to cover a transfer based on payment in specie. This is because s 16 provides that where any conveyance or transfer is not a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration, it shall be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos.* It is obvious that the transfer in the present case is not made in favour of the purchaser or incumbrancer and the other person is in good faith. Thus using this provision the transfer in this case is disposition *inter vivos.*
>
> [9] Section 16 is similar and in pari materia with the English statute on this matter as seen in the English case of *Associated British Engineering Limited v Commissioner of Inland Revenue* [1940] 7 KB 75. In that case, the issue arose on what is the stamp duty charged on the instrument of transfer of shares to the Company's shareholder pursuant to a resolution declaring distribution of capital bonus partly in specie and partly in cash. The Commissioner treated each transfer as a voluntary disposition *inter vivos* and charged *ad valorem* duty under s 74. It was held by Lawrence J that the disposition was a voluntary disposition and upheld the Commissioner's decision on the *ad volarem* stamping.

[10] In determining the value of the transaction, the House of Lords in *Stanyforth & Anor v Comissioners of Inland Revenue* [1930] AC 339 based the value for the amount of consideration for a sale had the deed been a conveyance or transfer on sale. Thus, even though there was no monetary consideration *ad volarem* stamping will be imposed based on such computation.

[18] Hence, I agree with the collector that there is a transfer or conveyance of a property that arises from the novation agreement which attracts stamp duty under item 32(a) of the First Schedule.

CONCLUSION

[19] For the above reasons, the application for judicial review was dismissed.

Application dismissed.

Reported by Dzulqarnain Ab Fatar